



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: FEBRUARY 02, 2023

IN THE MATTER OF:

Appeal Board No. 625751 A

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Appeal Board, on its motion pursuant to Labor Law § 534, has reopened and reconsidered Appeal Board No. 621667, filed June 28, 2022, which reversed the decision of the Administrative Law Judge (filed February 16, 2022) and overruled the initial determination ruling the claimant unable to file a valid original claim, effective June 28, 2021, based on the claimant's base period employment with because members of a Limited Liability Company are not considered employees and their services performed on behalf of the LLC are not covered employment under the unemployment insurance law.

The Board considered the arguments contained in the written statement dated August 4, 2022 submitted on behalf of the Commissioner of Labor.

The Board held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: In 2013, the claimant and her daughter, as equal owners, commenced operating a day care business, (hereinafter "Kids Care"), filed with the New York State Department of State.

In 2016, Kids Care encountered some financial difficulties and an accountant advised it to file an election to be treated as an S corporation to alleviate

some tax liability and to permit the claimant and her daughter to earn wages from Kids Care. Kids Care made the requisite applications to the Internal Revenue Service (IRS) and to the New York State Department of Taxation and Finance (NYSDTF) to be treated as an S Corporation. Subsequently, both the IRS and the NYSDTF approved Kids Care to be treated as an S Corporation effective January 1, 2017. Thereafter, Kids Care filed corporate tax returns, as well as paid W-2 wages to the claimant and her daughter. Kids Care issued annual W-2 statements, and the claimant declared W-2 income of \$19,300.00 from Kids Care on her individual 2020 tax returns. Also, Kids Care filed the Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return (NYS-45-ATT).

On June 25, 2021, Kids Care ceased operations. The claimant filed a claim for benefits effective June 28, 2021, thereby establishing a basic base period for the 1st, 2nd, 3rd, and 4th calendar quarters of 2020 in which NYSDTF credited the claimant with W-2 wages from Kids Care in the amounts of \$3,500.00, \$9,300.00, \$3,000.00, and \$3,500.00, per respective quarter, totaling \$19,300.00. The Department of Labor determined that these earnings from Kids Care were not from covered employment under the unemployment insurance law.

OPINION: The evidence establishes that the claimant's W-2 earnings from Kids Care should be treated as wages from covered employment for unemployment insurance purposes. Initially, the IRS publication, LLC Filing as a Corporation or Partnership,

<https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership>, in relevant part, provides the following:

A Limited Liability Company (LLC) ... with at least two members is classified as a partnership for federal income tax purposes unless it ... elects to be treated as a corporation. ... Thus, an LLC that has been treated as a partnership for several years may be able to prospectively change its classification to be treated as a corporation by filing [certain forms].

If the LLC [elects to be treated as] a corporation, normal corporate tax rules will apply to the LLC and it should file a Form 1120, U.S. Corporation Income Tax Return. The 1120 is the C corporation income tax return, and there are no flow-through items to a 1040 or 1040-SR from a C corporation return. However, if a qualifying LLC elected to be an S Corporation, it should file a Form 1120S, Form 1120S, U.S. Income Tax Return for an S Corporation Instructions,

U.S. Income Tax Return and S corporation laws apply to the LLC. Each owner reports their pro-rata share of corporate income, credits and deductions on Schedule K-1 (Form 1120S). (Emphasis added.)

Also, the IRS Frequently Asked Questions,

<https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-3>, in relevant part, provides the following:

An LLC may elect a classification as a C corporation or an S corporation (assuming the LLC otherwise satisfies the requirements). ... Use a Form 2553, Election by Small Business Corporation to make the election to be an S corporation. ... An eligible entity that timely files Form 2553 to elect classification as an S corporation is deemed to have made an election under Regulations Section 301.7701-3(c)(v) to be classified as an association taxable as a corporation. (Emphasis added.)

Here, Kids Care made the election and was approved by the IRS and NYSDTF to be classified and treated as an S corporation for tax purposes effective January 1, 2017. In addition, Kids Care commenced paying W-2 wages to the claimant, issued W-2 statements, and reported the W-2 earnings to New York State by filing the quarterly NYS-45-ATT forms. Under these circumstances, Kids Care complied with all the legal requirements to be treated as an S corporation for federal and state tax purposes, including under the New York State Department of Labor.

We are not persuaded by the Commissioner's contention that Matter of Heymann, 192 AD2d 861 (3d Dept 1993) is controlling. That case involved a partnership, rather than an LLC that elected to be treated a S corporation. We find that an LLC's election to be treated as a corporation for tax purposes is not inconsistent with Heymann. Similarly, we are not persuaded by the Commissioner's contention that Matter of Enjoy the Show Management Inc., DBA Teasers, 287 AD2d 822 (3d Dept 2001) is applicable. That case holds that "rulings of the Internal Revenue Service regarding whether an employer-employee relationship exists for tax purposes are not binding upon the Board", but it does not address the issue of whether an LLC's W-2 payments should be treated as covered employment after election and approval to be treated as a corporation by both the IRS and NYSDTF.

Accordingly, as Kids Care received approval by the IRS and NYSDTF to be

treated as a subchapter S corporation for tax purposes, and as the member-claimant who received W-2 wages for services performed for Kids Care that filed corporate tax returns and paid quarterly unemployment insurance tax contributions on form NYS-45-ATT, and as the claimant filed personal tax returns claiming such W-2 income from Kids Care, we conclude that such earnings are from covered employment for unemployment insurance purposes. To the extent that our prior Board decisions (Appeal Board Nos. 622295 and 559037) are inconsistent with this holding, the Board no longer follows those cases.

DECISION: The decision in Appeal Board No. 621667 is rescinded.

The decision of the Administrative Law Judge is affirmed.

The initial determination, ruling the claimant unable to file a valid original claim, effective June 28, 2021, based on the claimant's base period employment with because members of a Limited Liability Company are not considered employees and their services performed on behalf of the LLC are not covered employment under the unemployment insurance law, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER